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No. 96-186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD W. REESE, RICHARD D. KAUFFMAN, GEORGE R. JORDAN, BETTY SLATER, LARRY L. WYGLE, MARION R. CRAMBLIT, and TIMOTHY WANNER, on behalf of themselves and the class they represent,
Petitioners,

v.

CITY OF COLUMBUS; GREGORY S. LASHUTKA, Mayor City Of Columbus; LOCAL 1632, OHIO COUNCIL 8, AFSCME; and OHIO COUNCIL 8, AFSCME,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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I. RESPONDENTS MANUFACTURE DISPUTED FACTS WHERE NONE EXIST.

Respondents' Brief in Opposition ("Opposition") is a mixture of misrepresentations of, and omissions from, the record.

Respondents suggest that Petitioners are wrongly appealing from the denial of summary judgment. Opposition at 5-6 ("the opinion of the court below is not cast as a final ruling on the merits of the petitioners' claims—but only as a ruling upholding the denial of summary judgment and the vacation of a preliminary injunction—this case in its present procedural posture does not raise any questions warranting this Court's review").

Unexplained is why no one—not Respondents (who never before asserted such a claim), nor any member of the panel—noticed that Petitioners' appeal should, therefore, have been dismissed. *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir. 1992) (denials of summary judgment motions ordinarily are not appealable). Also unexplained is why, if "facts" were still at issue, the District Court ordered a trial **only** as to Petitioners' entitlement to punitive damages. App. D at 39a-40a; 826 F.Supp. 1115, 1122 (S.D. Ohio 1993). These failures explain why Respondents' suggestion is baseless.

This case does not present an "**interlocutory** legal issue," Opposition at 5 (emphasis added), simply because one of **two** appeals consolidated in the Sixth Circuit was from the District Court's vacation of its injunction, or because the District Court initially expressed its legal conclusion in an interlocutory, but appealable, order. That preliminary legal determination was, of course, rendered final when the District Court entered final judgment "for the reasons stated" in its Opinion and Order denying an earlier motion to dissolve the preliminary injunction. App. D at 37a; 826 F.Supp. at 1121. The District Court entered Final Judgment, App. C at 22a-23a, holding, **as a matter of law**, that nonmembers may constitutionally be charged for public speech unrelated to bargaining over their terms and conditions of employment—litigation, lobbying, and public relations/advertising expenditures for bargaining units other than their City of Columbus bargaining unit.

Moreover, contrary to Respondents' claims, neither of the lower courts ever found that "a disputed issue of material fact existed," Opposition at 4, as to whether nonunion public employees constitutionally can be required to contribute, as a condition of their continued employment, to the costs of: (1) litigation activities concerning bargaining units other than the employees' unit ("extra-unit litigation"); and (2) lobbying related to issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the employees' bargaining unit ("extra-unit lobbying"), incurred by the state and national affiliates of the bargaining representative imposed upon them by force of law.

To the contrary, the District Court's judgment was solely based upon the application of Rule 56(a), FED.R.CIV.P., *i.e.*, that the pleadings and evidence showed that there was no genuine issue as to any material fact and that, as a matter of law, entry of judgment was appropriate. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). *See* App. E at 45a ("The Court said, mistakenly, that ... the Supreme Court disapproved litigation expenses not related to the bargaining unit"), and App. D at 37a-38a (denying summary judgment as to these issue on purely legal grounds).[1] The Sixth Circuit recognized this fact when it affirmed as to these issues.

The panel understood that the District Court's decision constituted a purely legal determination. App. B at 8a; 71 F.3d 619, 623-34 (6th Cir. 1995) ("Although originally concluding that this charge was unconstitutional, ... the district court later reversed its view"; "the district court was faced with the difficult task of interpreting *Lehnert [v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)]").

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[1] While the panel phrased its review of the dissolution of the preliminary injunction in terms of determining whether the district court has "abused its discretion," this must be understood in light of the circuit law that discretion is abused in determining issues surrounding a preliminary injunction "when it improperly applies the law or uses an erroneous legal standard." *See, e.g., Lowary v. Lexington Loc. Bd. of Educ.*, 854 F.2d 131, 134 (6th Cir. 1988), *citing Christian Schmidt Brewing Co. v. G. Heilman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985).

Likewise, the panel was informed by the belief that the factual record was inadequate only as to the "lobbying expense in item 6." App. B at 13a.[2] This was because, in the panel's judgment, "For reasons not obvious from the record, the district court did not expressly apply the three-prong test to extra-unit lobbying expense in Item 6." *Id.* at 12a. Respondents' contrary assertion misrepresents the decisions below.

II. RESPONDENTS IGNORE THE SERIOUS FIRST AMENDMENT IMPLICATIONS OF THIS CASE.

Most striking is Respondents' silence about the first amendment implications of the decision below. Indeed, one searches the Opposition in vain for reference to the first amendment.

Nevertheless, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 221-22, 232 (1977), established that a strict form of scrutiny is required to determine chargeability; *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984), and *Lehnert*, 500 U.S. at 518, applied it.

All of the expenditures at issue here have significant "directly communicative content and involve the expression of ideas." *Ellis*, 466 U.S. at 456. Thus, expenditures for these activities are not chargeable because they "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Indeed, public relations/advertising and lobbying are "at the heart of the First Amendment's protection." *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978); *see Meyer v. Grant*, 486 U.S. 414, 427 (1988). Likewise, this Court has "long recognized the important political and expressive nature of litigation." *Lehnert*, 500 U.S. at 528, *citing NAACP v. Button*, 371 U.S. 415, 431 (1963).

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[2] Because, as a matter of law, expenditures for public relations/advertising for issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the nonmembers' bargaining unit ("extra-unit public relations/advertising"), never are chargeable under this Court's prior decisions—no matter the factual determinations which might be made by trial court pursuant to the panel's remand—review also is sought for this category of expenditures.

The extra-unit expenditures at issue are expressive because, as in *Lehnert*, they "are connected with political positions and philosophies with which the dissenters disagree." 881 F.2d 1388, 1395 (6th Cir. 1989) (Merritt, J., dissenting in part). Such activities—including the petitioning of government on subjects other than the nonmembers' terms and conditions of employment—are pure speech activities. Thus, the license grudgingly granted to unions by this Court to compel nonmembers to support such activities as they relate directly to "legislative ratification of, or fiscal appropriations for, their collective bargaining agreement," *Lehnert*, 500 U.S. at 519; *see also id.* at 559 (Scalia, J., concurring), does not and cannot extend beyond that limited context. *Lehnert* carved out a narrow exception to this Court's bar, *Machinists v. Street*, 367 U.S. 740, 768-69 & n.17 (1963), against charging nonmembers for **any** lobbying activities. 500 U.S. at 520; *see also id.* at 559 (Scalia, J.). The Sixth Circuit ignored this bar when it held that nonmembers can be compelled to subsidize such activities beyond the confines of their bargaining unit.

III. RESPONDENTS MINIMIZE THE CONFLICTING VIEWS OF THE LOWER COURTS.

Respondents' reading of the many opinions in *Lehnert*, *supra*, is disingenuous, elevating general statements of this Court and dissents from individual Justices above specific holdings of the Court as to specific categories of union expenditures.

A. No Court Has Distinguished Litigation Expenditures As Respondents Have.

Respondents answer Justice Blackmun's specific rejection of the notion that the general standard "extend[s] ... to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities," 500 U.S. at 528, with mere truisms, general observations appearing as much as **five pages earlier** in the opinion as it appears in the *United States Reports*. Opposition at 6, *citing* 500 U.S. at 523. Indeed, Respondents cite this Court's comments that "'unions may bill dissenting employees for their share of general collective-bargaining costs or the[ir] state or national parent union,' because so long as 'these costs [are found] to be germane to

collective bargaining and similar support services ... [n]o greater relationship is necessary' to make them chargeable to objecting fee payers." Opposition at 6-7, *citing* 500 U.S. at 527.

Respondents ignore that this Court, **in the very next sentence and paragraph in its decision**, goes on to state that "This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities." *Lehnert*, 500 U.S. at 528.

Further, like the District Court, App. E at 48a, Respondents cite Justice Scalia's opinion for the proposition that nonmembers derive a "tangible benefit" from various "on-call" union services, Opposition at 6, though Justice Scalia excluded litigation activities from his list of those "collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance)," *id.* at 561 (Scalia, J., concurring in part), for which nonmembers could be charged on an "on-call" basis. Moreover, Justice Scalia (like every other Justice) declared himself to be bound by and following *Ellis*, *supra*, *see* 500 U.S. at 555 (Scalia, J., concurring in part), which specifically declared that "expenses of litigation not having ... a connection with the bargaining unit are not to be charged to objecting employees." 466 U.S. at 455; **see also** Petition at 17 (discussing in detail Justice Scalia's views on these issues).

However, unlike the panel, Respondents do not ignore that this Court's decision in *Ellis*, 466 U.S. at 453, controls as to the chargeability of extra-unit litigation expenditures. Instead, they misrepresent it, asserting a "conceptual[] differen[ce]," Opposition at 6, where none exists.

Respondents' attempt to distinguish *Ellis*, *see* Opposition at 8, is unavailing, as two courts have recognized.[3] Justices Blackmun

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[3] Apparently guided by the principle that the best defense is a good offense, Respondents feign astonishment that "petitioners do not even attempt a reasoned distinction of such legal activity directly related to collective bargaining from other direct collective bargaining activity." Opposition at 8.

(continued...)

and Scalia **both** recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *See Lehnert*, 500 U.S. at 528 (opinion of Blackmun, J.); *id.* at 555 (opinion of Scalia, J.). Moreover, that holding was "an unqualified rule that charges for extra-unit litigation expenses are improper." *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295, 1316 (4th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 114 S. Ct. 195 (1993) (Russell, J., dissenting).

> The *Ellis* case makes no exception for litigation that helps the union in a general way or that benefits other bargaining units represented by the union. In order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit.

Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123, 1130 (10th Cir. 1991).

Contrary to Respondents' suggestion, *see* Opposition at 8, the litigation at issue in *Ellis* included litigation related to collective bargaining in other units. The "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings" held nonchargeable in *Ellis*, 466 U.S. at 453, was "intervention in an employee's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435,

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[3] (...continued)

In this regard, Petitioners hardly can be faulted for emulating this Court and every other appellate court addressing the issue, addressing the only relevant characteristic of litigation activity utilized to determine its chargeability—*i.e.*, its connection to the nonmember's bargaining unit. *Lehnert*, 500 U.S. at 528; see also *Ellis*, 466 U.S. at 453. A union's ability to characterize litigation as "bargaining activity" for other bargaining units is irrelevant.

Additionally, in apparent recognition of their peril, Respondents have shifted their argument. Having successfully convinced the courts below that *Lehnert*'s general test—rather than its specific holding as to this issue—governs, App. B at 8a-9a, 71 F.3d at 623-24, Respondents now claim that *Lehnert* and *Ellis* do not mean what they plainly say!

453 (1984). And, "defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative," but such expenditures were held non-chargeable by *Ellis*, 466 U.S. at 453, unless the nonmembers' "bargaining unit is directly concerned." This is the plain teaching of both *Lehnert* and *Ellis*.

Further, notwithstanding this plain language, Respondents continue to elevate opinions of one or two Justices—those therefore rejected by the Court's majority—into binding precedent of this Court. In the courts below, Respondents suggested that Justice Marshall's lone opinion in *Lehnert* controls; to oppose this Petition, Respondents now claim that Justice Kennedy's solitary concurrence and dissent somehow controls because it "is the *only Lehnert* opinion that directly addresses the issues of 'litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative.'" Opposition at 8, *citing* 500 U.S. at 563 (Kennedy, J., concurring in part and dissenting in part).

Bootstrapping their application of this lone opinion with Justice Scalia's, Justice Blackmun's, and Justice Marshall's, Respondents conclude that "the treatment of litigation in the four *Lehnert* opinions" supports the judgment of the panel below. Opposition at 9. This curious conclusion conflicts with Justice Blackmun's plain statement, 500 U.S. at 528, and with Justice Marshall's recognition, in no less than four different places, that he dissented from "the court's opinion" that extra-unit litigation expenditures are nonchargeable. *See* Petition at 16-17 (detailing Justice Marshall's comments). Perhaps no comment is so *apropos* as that made by a judge of the Fourth Circuit in response to an identical argument: "While the union's suggestion is creative, it is not persuasive." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).

Respondents rely upon similar creativity to dismiss the conflict between the panel's decision below with those of other appellate courts, criticizing those courts because "none of these cases presented the distinction between the chargeability of 'litigation [that] is undertaken in the courts of the union's duties as exclusive

bargaining representative.'" Opposition at 9-10; *but see Pilots Against Illegal Dues*, 938 F.2d at 1129-30; *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Commission*, 169 Wisc.2d 79, 485 N.W.2d 376, 388 (1992).

While these courts generally ignored Respondents' tortured distinction because it was rendered irrelevant by this Court's decisions, with regard to *Browne*, Respondents' claim affirmatively misrepresents the decision of Wisconsin's Supreme Court. Respondents assert that "none of these cases presented the distinction between the chargeability of 'litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative." Opposition at 9. But *Browne* unmistakably does so.

In *Browne*, the court **reversed** WERC's holding "that jurisdictional dispute proceedings, impasse mechanisms, and litigation 'related to concerted activity and collective bargaining' are chargeable, even if the nonunion employees' units are not involved." 485 N.W.2d at 388. The court went on to "conclude that unless the litigation is **directly** related to the objecting employee's **bargaining unit**, it is nonchargeable." *Id.* Thus, *Browne* directly addressed the issue which Respondents assert was not presented in that case.[4]

B. Forced Subsidization Of Extra-Unit Lobbying And Public Relations/Advertising Expenditures Directly Violates Nonmembers' First Amendment Rights.

Respondents criticize Petitioners' challenge to extra-unit public relations/advertising expenditures by casually dismissing their "faulty analogy," Opposition at 10, a charge more properly leveled at the courts below. Like the *Lehnert* panel's majority, the panel below drew an inapt "comparison of public relations expenses to"

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[4] Another state-wide affiliate of the national union, the American Federation of State, County and Municipal Employees (AFSCME), was an intervenor in the *Browne* litigation. 485 N.W.2d at 380.

union expenditures related to preparations for a strike, albeit illegal. App. B at 9a-10a, 71 F.3d at 624.

When it permitted unions to charge nonmembers for preparations for an illegal strike, this Court recognized that a strike is a traditional collective bargaining tool, directed primarily at the employer. The Court rejected objections which may derive "solely from the union's involvement in them," holding that "'the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union.'" *Lehnert*, 500 U.S. at 529, *quoting Ellis*, 466 U.S. at 456, and *citing* 881 F.2d at 1394.

The same cannot be said of extra-unit public relations/ advertising expenditures. For while they may well be strictly limited to bargaining subjects in other units, their objectionable character lies in the public expression of ideas with which the nonmembers may object, and which relate not at all to bargaining over his or her terms and conditions of employment.

Further, Respondents' statement that Petitioners "provide no support for their claim" that such expenditures are chargeable to nonmembers suggests that they missed pages 21-25 of the Petition, which explains in detail why such expenditures, as "speech of a political nature in a public forum," 500 U.S. at 528, have been held by this Court to be nonchargeable outside of the narrow context of the nonmembers' bargaining unit. Thus, Respondents ignore that such expenditures of necessity fail the third prong of the *Lehnert* test, 500 U.S. at 519, for they impact upon nonmembers solely as citizens and taxpayers, not as represented employees.

Instead, Respondents focus only upon the narrow language of *Lehnert*, "public speech in support of the teaching profession generally," 500 U.S. at 528, *quoted at* Opposition at 10, rather than the touchstone identified by this Court, the nature and the quality of that "speech of a political nature in a public forum," *id.*, which renders such expenditures to be nonchargeable. Respondents' stilted interpretation of this language suggests that unions may avoid constitutional mandate simply by artful linguistic dodges.

Stripped to its essence, Respondents' argument boils down to the proposition that the panel alone is correct in its determination that this Court's decisions permit it to compel nonunion City of Columbus employees to subsidize its extra-unit litigation, public relations/advertising, and lobbying, activities undertaken throughout the State of Ohio, and the nation, and that conflicting decisions of other Circuits and state Supreme Courts really do not conflict with the panel's decision. Respondents posit that this Court didn't really mean what it said when it barred charging for extra-unit litigation expenditures in two separate decisions. *Lehnert*, 500 U.S. at 528; *Ellis*, 466 U.S. at 453. No response is more apt than that of the Tenth Circuit, when presented with a like argument: "At bottom, [the union's] argument boils down to a contention that the Supreme Court did not mean what it said in *Ellis*. We think the Court meant what it said." *Pilots Against Illegal Dues*, 938 F.2d at 1130.

CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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